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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

SPORTSERVICE CORPORATION and J. C. GRANATA,
Petitioners,

vs.

NORTHERN ILLINOIS DEVELOPMENT CORPORATION, an Illinois corporation operating the AURORA DOWNS, INC. (a wholly owned subsidiary),
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Options below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Reasons for granting the writ	4
Conclusion	6
Appendix	
A—Order of referee confirming arrangement	1a
B—Order of District Judge	17a
C—Debtors 2nd Amended Plan of Arrangement	20a
D—Opinion and judgment below	30a
E—Statutes	38a

CITATIONS.

Cases:

General Foods v. Shlensky, 350 U.S. 462	6
In Re May Oil Burner Corporation, 38 F. Supp. 516	5
In Re Northern Illinois Development Corporation, 309 F. 2d 882	3
In Re Pure Penn Petroleum Company, 188 F. 2d 851	2, 4, 5

Statutes:

Bankruptcy Act, 11 U.S.C. 706, 713, 766	2
11 U.S.C. 53, General order No. 18	2
Ill. Rev. Stat., Ch. 32 §§ 157.72, 157.76	2, 5

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PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on October 17, 1963.

CITATIONS TO OPINIONS BELOW

The order of the Referee in Bankruptcy (R. 4) is unreported and printed in Appendix A hereto, *infra*, pp. 1a-16a. The order of the District Court (R. 84), printed in Appendix hereto, *infra*, pp. 17a-19a, is unreported. The opinion of the Circuit Court of Appeals, printed in Appendix D hereto, *infra*, pp. 30a-37a, is reported in 324 F. 2d 104.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 17, 1963, p. 30a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Is the decision of the instant case approving corporate liquidation under Chapter XI or the ruling of the Second Circuit in *Pure Penn Petroleum* the correct pronouncement of the scope of Chapter XI?

2. May a Chapter XI Amended Arrangement validly provide for the private sale of the corporation's sole asset where the Court of Appeals finds that "the sale results in a plan of arrangement which effects a liquidation" and that "no shareholder equity is available"?

3. May a Chapter XI Arrangement be approved when from the outset the arrangement demonstrates the corporation is hopelessly bankrupt; and provides for the private sale of all assets, liquidation of the corporation, total elimination of shareholder equity and only the possibility of a 5% dividend to unsecured creditors?

4. May a Court of Appeals ignore the requirement of state law that directors and shareholders must vote approval of liquidation or the sale of all corporate assets in approving a Chapter XI Arrangement by making a "bootstrap" finding that the sale contemplated by the arrangement eliminates shareholder equity?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are contained in Chapter XI of the Bankruptcy Act, 11 U.S.C. 706, 713, 766 and 11 U.S.C. 53 General order No. 18. Also Ill. Rev. Stat., Ch. 32, §§ 157.72, 157.76. They are printed in Appendix E, *infra*, pp. 38a-39a.

STATEMENT

An involuntary petition in bankruptcy was filed against Northern Illinois Development Corporation and its wholly owned subsidiary, Aurora Downs, Inc. on November 2, 1960. The jurisdiction of the District Court was invoked because the case arises under the Bankruptcy Act. On the 2nd day of March, 1961, respondent filed schedules of its assets and liabilities and simultaneously therewith, filed a Plan of Arrangement under Chapter XI of the Bankruptcy Act, which provided for the outright liquidation of the corporation. Thereafter, the question of debtor's interest under a land contract was adjudicated by the Referee, the District Court, and the United States Court of Appeals for the Seventh Circuit, in an opinion of November 20, 1962, reported in *In Re Northern Illinois Development Corporation*, 309 F.2d 882, from which opinion a Petition for Certiorari was taken and denied on April 15, 1963. (October Term 1962 No. 839)*

Thereafter, in April, 1963, respondent filed a second Amended Plan of Arrangement, printed in Appendix C, hereto, *infra*, pp. 20a-28a. This Second Amended Plan of Arrangement, submitted under Chapter XI, on terms privately negotiated, called for the sale of all of debtor's tangible assets, which consist exclusively of interests in real estate, to a private individual for $1,200,000.00, without advertisement, public sale or appraisal. The Plan goes on to effectuate the liquidation of the corporation with a five per cent (5%) dividend to unsecured creditors

* Petitioners herein were not parties to the Appeal therein presented and had no contested interest in the issues therein presented.

and a complete extinction of shareholder equity. Upon application for confirmation, petitioners, Sportservice Corporation and J. C. Granata, objected.** Respondent offered no testimony whatsoever in support of its Second Amended Plan of Arrangement. Petitioners introduced the only evidence of record in opposition to confirmation.

Notwithstanding the complete absence of evidence, the Referee made Findings of Fact on feasibility, good faith, and best interests of creditors, and over-ruled petitioners' objections.

The District Court affirmed the referee in all respects and the Court below affirmed the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below in the instant case is directly in conflict with the decision of the Second Circuit Court of Appeals in *In Re*: *Pure Penn Petroleum Co.*, 188 F. 2d 851 (1951). In the latter case the Court held basically that a Plan of Arrangement which contemplated outright liquidation could not be approved under Chapter XI of the Bankruptcy Act. The Court was obviously mindful that creditors and shareholders who were being adversely affected in liquidation are entitled to basic and fundamental protection. The protective devices available are found in the straight bankruptcy provisions of the Act; and they include advertisement, appraisal and public sale. In the instant case the Court finds "that no shareholder equity is available," *infra* p. 34a; and "that the sale results in a plan of arrangement which effects a liquidation" *infra* p. 36a. The opinion then attempts to distinguish respond-

** Sportservice Corporation is an unsecured creditor to the extent of $55,000.00 out of a gross unsecured indebtedness of $398,846.00. J. C. Granata is the registered owner of 50,000 of the 1,500,000 shares outstanding.

ent's liquidation from *Pure Penn Petroleum* on the premise that respondent's assets are "speculative" and "perishable". No doubt there is a speculative element involved, but the real estate in question is hardly perishable and there is no evidence of record on which to base a finding that debtors' assets are perishable. Unless this Court resolves the conflict between *Pure Penn Petroleum* and the instant case, the Courts will be unable to supervise privately conducted maneuverings in the fiscal affairs of a distressed corporation, thus placing in grave jeopardy the rights of creditors and shareholders.

2. Clearly the questions presented are of importance in the administration of the Federal Bankruptcy Laws. The Congress took great pains to provide minimum safeguards, such as notice, public auction and appraisal to protect interested parties. None of these minimum standards was complied with in the instant case. To permit this case to stand will inject into the structure of the Bankruptcy Act a vehicle for privately conducted liquidation under the guise of Chapter XI, with no procedures to protect unsecured creditors and shareholders.

3. The decision in the Court below is believed to be erroneous and conflicting with, not only *Pure Penn Petroleum*, but also the well reasoned opinion in *In Re May Oil Burner Corporation*, 38 F. Sup. 516 (1941), which held that an arrangement which affects stockholders, whether materially or adversely, cannot be maintained under Chapter XI. In addition, in *May Oil Burner*, the Court held that in Chapter XI proceeding, the distressed corporation could not ignore state statutes requiring director and shareholder approval for either liquidation or the sale of substantially all of the corporate assets other than in the normal course of business. Illinois has such statutes and management totally ignored them in the instant case. The

decision in this case is probably in conflict with the decision of this Honorable Court, set forth in *General Stores Corp.* v. *Shlensky*, 350 U.S. 462, 100 L. ed. 550, 76 S. Ct. 516 (1955). While the decision in *Shlensky* involves the issue of the applicability of Chapter XI as opposed to Chapter X, it is implicit in both majority and minority opinions that Chapter X and Chapter XI are vehicles for rehabilitation, not liquidation, of a distressed corporation. It is apparent that the intent of Congress was to provide for liquidation through straight bankruptcy, whereas in furnishing the useful tools of Chapter X and XI, the Congress envisioned nothing more than offering a cure for the fiscally sick so that it might once again be healthy.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD J. KELLY,
JOHN T. COBURN,
Attorneys for Petitioner.

COBURN AND KELLY,
Of Counsel.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

In The Matter Of NORTHERN ILLINOIS DEVELOPMENT CORPORATION, an Illinois corporation, operating the AURORA DOWNS, INC. (a wholly owned subsidiary), Debtor, in Chapter XI Proceeding	In Bankruptcy No. 60 B 10589

ORDER CONFIRMING ARRANGEMENT
(Entered July 19, 1963)

On the application of Northern Illinois Development Corporation, Debtor, to confirm its proposed Second Amended Plan of Arrangement with Creditors under Chapter XI of the Federal Bankruptcy Act; due Notice having been given to all Creditors, Attorneys of Record and other Parties in Interest; certain Objections to said Plan of Arrangement having been filed and having been heard and overruled by this Court; and certain Parties being present in open Court by their respective Attorneys, including Northern Illinois Development Corporation, Debtor, by Wayland B. Cedarquist and Charles H. Atwell, its Attorneys; Orville P. Fox and St. Charles National Bank, Trustee, by their Attorney Richard Shearer; Sportservice Corporation by Edward Kelly and Frank Rowan, its Attorneys; and Titus Haffa by Robert M. Woodward, his Attorney, and the Court having heard argument and being fully advised in the premises:

The Court Finds:

1. Northern Illinois Development Corporation, hereinafter sometimes referred to as NIDC, is an Illinois Cor-

poration and is the Debtor in this Proceeding. NIDC is the owner of the Buyer's Equitable Interest in the Aurora Downs Race Track, under a certain Agreement dated March 14, 1957, between St. Charles National Bank and Orville P. Fox, as Sellers, and David Schwanz, as Buyer, the same having been assigned by Schwanz to NIDC. The Aurora Downs Race Track consists of approximately 110 to 120 acres of land, more or less, improved with facilities for Harness Racing Meets. NIDC's Equitable Interest therein has not been forfeited, and is still in full force and effect, pursuant to Decision of the Referee in this cause, entered November 14, 1961, said Decision having been affirmed by the District Judge on February 6, 1962 and by the United States Court of Appeals for the Seventh Circuit on November 20, 1962; and the Fox Petition for Certiorari having been denied by the United States Supreme Court on April 15, 1963.

2. NIDC, on June 15, 1962, entered into an Agreement with Haffa to sell NDIC's interest in the property for $1,500,000, of which $1,100,000 was to be paid by Haffa, and $400,000 was to be paid by Creditors' assignments. Pursuant thereto, Haffa deposited $50,000 as earnest money. This Court approved said Agreement and directed that the $50,000 be deposited with Nathan P. Yorke, the Disbursing Agent appointed by this Court in this cause. Said $30,000 was deposited with the Disbursing Agent and is still in his possession.

3. Haffa, on April 5, 1963, submitted to NIDC an Offer for Amended Agreement, proposing a purchase price of $1,150,000; and NIDC accepted said Offer, subject to submission to this Court for approval or rejection. Said Amended Agreement provided that Haffa was to deposit an additional $100,000 as earnest money. Haffa has deposited said $100,000 with Nathan P. Yorke, Disbursing Agent appointed in this cause. The total of Haffa deposits presently in the possession of the Disbursing Agent, for earnest money, therefore, is now $150,000.

4. On April 30, 1963, Haffa and NIDC entered into a further Amendment of the Agreement, dated April 5, 1963, providing for a purchase price of $1,200,000.

5. It appears that NIDC has negotiated at length with Haffa for an increased price; and at the present time is unable to obtain any higher price than the foregoing. It further appears that NIDC has sought other possible interested purchasers, but that no such purchaser has come forward with any written offer at the present time.

6. The Aurora Downs Race Track is the Debtor's principal asset. The highest and best use of the land and improvements constituting the Aurora Downs Race Track is for horse racing and related purposes. The Court finds that this potential use is such that the subject property is a speculative property, highly perishable in nature and with limited resale value.

7. NIDC has presented to this Court, pursuant to Leave of Court granted on June 21, 1963, a Second Amended Plan of Arrangement with Creditors, said Plan providing that NIDC will sell its interest in the Aurora Downs Race Track to Haffa for $1,200,000 cash; that the $1,200,000 cash proceeds of sale will be distributed in a First Distribution; and that NIDC will prosecute its Claim for Damages against Fox and St. Charles Bank in Suit No. 59-1692 in the Circuit Court of Kane County, Illinois, and any damages realized will be distributed in a Second Distribution.

8. The Second Amended Plan of Arrangement proposes that the First Distribution consist of payment of Fox and St. Charles National Bank, costs of Administration, certain Secured Claims, Secured Creditors (as voluntarily settled and compromised), and Unsecured Claims (at not less than 5% of the value of the Claims). It further proposes that the Second Distribution consist of payment of Fees and Costs and certain Claims, with any remaining balance to be paid to Secured and Unsecured Creditors, pro-rata on a per capita basis throughout both

classifications. The Terms of said First and Second Distributions are set forth in said Plan of Arrangement and hereinafter in ths Order. The Court finds, as to the proposal that the Repayment of Haffa $15,000 Advances be deferred to the Second Distribution has been assented to by Haffa, by his Attorney, in open Court.

9. The Plan of Arrangement represents, and this Court finds, that the total obligation of NIDC, the Debtor, to Fox and St. Charles Bank under the Fox-Schwanz Agreement dated March 14, 1957, is that NIDC pay Fox and the Bank the sum set forth in the Order of this Court dated November 14, 1961, namely, the gross sum of $980,465.62, together with Real Estate Taxes paid by Fox and the Bank for 1959 and 1960 in the amounts of $6,462.74 and $7,295.58, or a total gross sum due Fox of $994,223.94, the same to be reduced by Credits to NIDC for Title Charges (not yet ascertained) and Hilton Rentals paid to Fox in the amount of $57,789.56, or a net amount due Fox as of August 31, 1963 (the approximate date of Escrow Closing) of not to exceed $936,434.38; and that the Debtor owes no other or further obligation or sum to Fox and the Bank. The Court's findings in this regard are incorporated in Exhibit B-1 (Secured Claimant—Fox and Bank), attached hereto and made a part hereof. The deduction for said Title Charges operates as a credit on Debtor's behalf, as against any money owing from Debtor to said Bank and Fox, in view of the obligation of said Bank and Fox to pay all Title Charges under the original Agreement dated March 14, 1957. The deduction for Rental Credits operates as a credit on Debtor's behalf, as against any money owing from Debtor to said Bank and Fox, pursuant to the terms of the Order of this Court entered November 14, 1961. If the Escrow Closing occurs beyond August 31, 1963 and if Fox and the Bank receive additional Hilton Rentals of $1,333.33 per month beyond that date, the foregoing amount due Fox and the Bank shall be reduced in the amount of said additional Credits.

10. The Plan of Arrangement represents that the Debtor has obtained certain settlements and compromises with Secured Creditors and has obtained consents in

writing from a majority (in dollars and numbers) of Unsecured Creditors, the same to be filed on or before June 26, 1963. This Court finds that such settlements and compromises of Secured Creditors, and Consents of Unsecured Creditors, were filed on June 26, 1963. The Court finds that the settlements and compromises with Secured Creditors are in the amounts set forth in Exhibit D attached hereto. The Court finds that the Consents of the Unsecured Creditors, as filed, total 36 in number and $211,166.91 in amount, the same being more than Fifty Per Cent in dollars and numbers of the total of Unsecured Creditors.

11. The Plan of Arrangement further represents, and this Court finds, that the Claim of Fox and St. Charles Bank for $3,000,000 (alleged Damages claimed in pending suit entitled Fox and St. Charles Bank vs. NIDC, Circuit Court of Kane County, Illinois, Case No. 59-1805) arises from the same subject matter as the Title Litigation Dispute already resolved in this proceeding in favor of the Debtor; and against Fox and St. Charles Bank. The Court finds that said Claim is not presently liquidated and cannot reasonably be estimated; that it would unreasonably delay ruling on the Plan to await possible determination of the Claim; and that said Claim should therefore be disallowed for the purposes of this Proceeding.

12. The Plan of Arrangement represents that the total funds available for the First Distribution will consist of the net proceeds of the sale of the Aurora Downs Race Track to Haffa at a gross price of $1,200,000 cash; that the total funds needed for the First Distribution will be approximately $1,230,000; and that Adjustments estimated at $20,900 are available, in that Haffa by his Attorney, has stated in open Court that it is agreeable to allow for Pro-Ration, at the Escrow Closing, of such Percentage Rentals as shall be determined to have accumulated through the date of the Escrow Closing, even though the same are not payable until after December 31, 1963. The Court finds that it is reasonable to anticipate that

said Credits and Adjustments are available in sufficient amounts so that said proposed Plan cannot be deemed to be anything other than workable in view thereof; and that, in any event, as is hereinafter set forth, if the available funds at the Escrow Closing are not sufficient for the First Distribution, the Disbursing Agent is directed not to disburse funds but to withhold action until further Order of this Court.

13. The Court further finds that a certain Lease, dated July 1, 1959, was entered into between certain Lessors (St. Charles Bank, as Trustee of Fox Trust, and NIDC) and Hilton Inns, Inc., Lessee; that the Base Rental is $1,333.33 per month, payable monthly, and a Percentage Rental of 2% of Gross Profits, payable within 90 days after each December 31st; and that said Rentals, pursuant to order of this Court dated November 14, 1961, operate as a Credit to NIDC as against monies owing by NIDC to Fox and St. Charles Bank. Said Lease relates to a portion of the subject premises and should be assigned to Haffa or his Nominee as purchaser of the premises, subject to the foregoing Credits and Pro-Rations of Rentals. Such Base Rentals and Percentage Rentals, as have been paid up to the date of the Escrow Closing, shall be Credits toward the First Distribution. Such Percentage Rentals, as shall be determined to be accumulated through the date of the Escrow Closing, shall be allowed as Pro-Rations, to Debtor's Credit, even though said Rentals will not be paid until after December 31, 1963.

14. The Plan of Arrangement was filed in this Court, pursuant to Petition filed by the Debtor on June 21, 1963, which Petition and Amended Plan together constitute a sufficient Application for Confirmation. The Court finds that copies of said Petition and Plan were mailed on June 21, 1963, to all Creditors, Claimants, Attorneys of Record, and other Parties in Interest. The Petition and Plan proposed that certain Notices (setting dates for the filing of Objections and Hearings thereon and a date for Hearing on the Application for Confirmation) be mailed to all Creditors, Claimants, Attorneys of Record and other

Parties in Interest. The Court finds that such Notices were mailed on June 21, 1963; and that the same constituted good and sufficient notice. Thereafter, Objections were filed on behalf of Charles P. McFarland, Orville P. Fox, and St. Charles National Bank, Trustee, and Sportservice Corporation. This Court has held Hearings on said Objections and has entered an Order denying each Objection. The Court further finds that in April, 1961, this Court appointed a Creditors' Committee and designated the Attorneys for certain Creditors, then appearing in open Court, to act in that regard; and this Court further finds that, due to the extended Title Litigation hereinabove referred to, said Creditors' Committee (though each Creditor member of said Committee has been given full and sufficient Notice of all matters herein referred to) has made no recommendations and has filed no objections with regard to the proposed Plan of Arrangement.

15. The Court finds that the payments to Attorneys Wayland B. Cedarquist and Charles H. Atwell, set forth at Exhibit C, cover Legal Services and Disbursements up to January 14, 1963 as per Court Orders entered on February 15 and 21, 1963; that said Attorneys have rendered extensive Legal Services and have made Disbursements from January 15, 1963, to the date of this Order; that said Services have been valuable and have benefited the interests of Unsecured Creditors herein, in that the same have related to the preservation of the Debtor's principal asset, unique and perishable in nature, said Services consisting of the negotiating of successive Agreements with Haffa and the preparation and presentation of this Plan of Arrangement, the same being necessary for the consummation of said agreements; and that said Attorneys are entitled to such fair compensation for said Services and Disbursements as shall be set in due course by Order of this Court, the same to be paid from the Second Distribution.

16. The Court finds that this Court continued to have jurisdiction of the subject matter hereof and over all parties hereto; that Northern Illinois Development Corpo-

ration, the Debtor, has not been adjudicated to be a bankrupt but has submitted a Second Amended Plan of Arrangement with Creditors, pursuant to the provisions of Chapter XI of the Federal Bankruptcy Act; that the proposed Plan of Arrangement is for the best interests of the Creditors of the Debtor; that the provisions of Chapter XI of the Federal Bankruptcy Act have been complied with by the Debtor; that the proposed Arrangement is fair and equitable, and is feasible and workable; that the Debtor has not been guilty of any act, and has not failed to perform any duty, which would be a bar to the discharge of a bankrupt; and that the proposal of the Arrangement and the acceptance thereof are in good faith and have not been made or procured by any means, promises or acts forbidden by the Federal Bankruptcy Act.

The Court, Therefore, Orders, Adjudges And Decrees That

1. This Court continues to have jurisdiction of the subject matter hereof, namely, the Debtor's Second Amended Plan of Arrangement and all related matters and controversies, pursuant to the provisions of Chapter XI of the Federal Bankruptcy Act; and this Court continues to have jurisdiction over all parties hereto, including but not being limited to, the Debtor, Northern Illinois Development Corporation; and Claimants including Orville P. Fox and St. Charles National Bank, Trustee under a Trust Agreement dated November 2, 1949, known as Trust No. 85 with said Fox as sole beneficiary; and Creditors; and Nathan P. Yorke, the Disbursing Agent appointed by this Court.

2. The Debtor's Second Amended Plan of Arrangement with Creditors, a copy of which is attached to this Order and made a part hereof, as Exhibit A, is hereby confirmed.

3. The Debtor shall proceed with all matters and things to be done and performed by it with regard to the First Distribution under the Plan of Arrangement, as follows:

3-a. The Debtor shall proceed to perform all undertakings on its part to be performed under Debtor's Agreement to sell Debtor's Equitable Interest in the Aurora Downs Race Track to Titus Haffa for a price of $1,200,000, on the terms and conditions therein contained, said Agreement being dated April 5, 1963, as amended April 30, 1963, including delivery of Evidence of Title and deposit in Escrow of a good and sufficient Deed from Debtor or from Debtor's Seller or from said Seller's nominee, or from this Court's Special Commissioner hereinafter named; all of said matters and things to be done and performed on or before the dates set forth in said Agreement.

3-b. On or before the date set forth in said Agreement for the deposit of a Deed in Escrow, St. Charles National Bank, a national banking association at St. Charles, Illinois, Trustee under a Trust Agreement dated November 2, 1949, known as Trust No. 85, with Orville P. Fox as sole Beneficiary, and Orville P. Fox, individually, are ordered and directed to execute a good and sufficient Warranty Deed, granting the premises known as Aurora Downs Race Track, and legally described in the certain Agreement with F. David Schwanz, dated March 14, 1957, said Deed to be to Northern Illinois Development Corporation or to its Nominee, including, but not being limited to, La Salle National Bank, Trustee, under Trust Agreement dated May 8, 1952, its Trust No. 14358; said Deed to be subject to the matter set forth in the NIDC-Haffa Agreement, said Deed to be delivered by said Bank and Fox to said Escrow on or before the date for deposit of a Deed under said NIDC-Haffa Agreement, provided that Haffa shall, on the same day or within three calendar days after that day, deposit in said Escrow the $1,050,000 balance of the purchase to be paid by him, as set forth in said NIDC-Haffa Agreement. If said St. Charles National Bank and Orville P. Fox fail to deliver said Warranty Deed as herein directed, then Francis L. Zimmerman is appointed to be Special Commissioner of this Court, effective on

the first calendar day of any such default by said Bank and Fox; and he is directed, as such Special Commissioner, to execute and deliver said Deed, on behalf of said Bank and Fox, to the Debtor or its Nominee, as herein set forth.

3-c. On or before the date set forth in said NIDC-Haffa Agreement for the deposit of a Deed in Escrow, NIDC is ordered and directed to execute a good and sufficient Warranty Deed, granting the approximately 1½ acres of the premises owned by NIDC in Fee Simple, to Haffa or to his Nominee, including as such Nominee, but not being limited to, La Salle National Bank, Trustee under its Trust Agreement dated May 8, 1952, its Trust No. 14358; said Deed to be subject to those matters set forth in the NIDC-Haffa Agreement; and said Deed to be delivered by NIDC to said Escrow on or before the date for deposit of said Deed under the NIDC-Haffa Agreement, provided that Haffa shall, on the same day, or within three Calendar days after that day, deposit in said Escrow the $1,050,000 balance of the purchase price to be paid by him, as set forth in said Agreement.

3-d. On or before the date set forth in said NIDC-Haffa Agreement for the deposit of the Deed in Escrow, said Bank and Fox, together with NIDC, are ordered and directed to execute an Assignment of the Lessor's Interest in the aforesaid Hilton Lease, to Haffa, or to his Nominee as aforesaid; said Assignment to be delivered by said parties to the Escrow Agent, on the same terms and conditions as are set forth in Sub-Paragraphs 3-b and 3-c hereof for delivery of Deeds. If said Bank and Fox fail to join with NIDC in the execution of said Assignment of Lease, then the aforesaid Francis L. Zimmerman, special Commissioner of this Court, is directed to join with NIDC in the execution and delivery of said Assignment, as above set forth in Sub-Paragraph 3-b with regard to the Deed from the Bank and Fox.

3-e. Upon consummation of the Escrow Closing, as provided in said NIDC-Haffa Agreement, the Escrow Agent shall deliver to Nathan Yorke, the Disbursing Agent appointed by this Court, the Deed (and Assignment of Lease) to the subject property and a Cashier's Check payable to said Yorke as Disbursing Agent in the amount of the balance of the net proceeds of said $1,200,000 sale, after Pro-Rations for (i) Real Estate Taxes, (ii) Hilton Percentage Rentals (as hereinabove set forth at Paragraph 12 of Findings), and (iii) any other agreed Pro-Rations or Adjustments approved by this Court.

3-f. Nathan Yorke is directed to receive the foregoing Deed (and Assignment of Lease) and Cashier's Check, as Disbursing Agent; and to deposit said Cashier's Check in the Account maintained by him as Disbursing Agent herein, together with the $150,000 Haffa Earnest Money already on deposit therein. If the total then on deposit is not sufficient to pay the First Distribution as hereinafter set forth, the Disbursing Agent shall take no action until further Order of this Court. If said total is sufficient, said Disbursing Agent shall promptly deliver the Deed (and Assignment of Lease) to Haffa and make disbursement of said monies as hereinafter set forth, in Sub-Paragraphs 3-h through 3-l; and remit any remaining balance to the Referee and file the Disbursing Agent's Report, as set forth in Sub-Paragraphs 3-m and 3-n herein.

3-g. Nathan Yorke shall then make disbursements of said monies, by checks drawn and signed by Nathan Yorke, as Disbursing Agent appointed by this Court, as set forth in the following Sub-Paragraphs hereof.

3-h. Nathan Yorke, unless otherwise directed by Order entered by this Court before the date of his delivery of the following check, shall issue his check and pay to St. Charles National Bank, as Trustee as aforesaid, and Orville P. Fox, as sole Beneficiary, the net sum of money resulting from the following

computation: i.e. the gross sum of $980,465.62 as set forth in Order dated November 14, 1961, together with any Real Estate Taxes paid by Fox for 1959 and following years, as specified by further Order of this Court, and reduced by the Credit for Title Charges and the Credit for all Hilton Rentals paid to the Bank and Fox (or credits allowed by Hilton Inns, Inc. to the Bank and Fox, as by Hilton payment of Real Estate Taxes) before the date of the Escrow Closing, also to be specified by Order of this Court.

3-i. Nathan P. Yorke shall issue his checks and pay to each person named in Exhibit B (Creditors to whom Priority is Secured by the Act), attached hereto and made a part hereof, the sums of money set opposite their respective names in the column headed "Cash Payment", provided that he shall not issue a check to the State of Illinois for alleged Corporation Franchise Taxes unless this Court has first entered an Order determining that the same is due and owing by the Debtor, and provided that he shall not issue Checks for Real Estate Taxes or for Tax Sale Redemptions, unless this Court has first entered a further Order approving the same.

3-j. Nathan P. Yorke shall issue his checks and pay to each person named in Exhibit C (Costs of Administration and Expenses of Proceeding), attached hereto and made a part hereof, the sums of money set opposite their respective names in the column headed "Cash Payment".

3-k. Nathan P. Yorke shall issue his checks and pay to each person named in Exhibit D (Creditors Holding Securities, and Secured Claimants, including St. Charles Bank and Fox, Return of Haffa advances) attached hereto and made a part hereof, the sums of money set opposite their respective names in the column headed "First Distribution Cash Payment".

3-l. Nathan Yorke shall issue his checks and pay to each person named in Exhibit E (Insecured Creditors), attached hereto and made a part hereof, the remaining funds then in his hands, as Disbursing Agent, on a pro-rata basis among the persons therein named and based on the amounts (hereby specifically approved) set opposite their respective names, as set forth in the column headed "Claimed as Allowed," but not less than Five Per Cent of said respective amounts, said Five Per Cent amounts being set forth in the column headed "Computed at 5%." As set forth in Paragraph of Findings in this Order, the unliquidated Claim of Fox and St. Charles Bank (based on Suit 59-180o, Circuit Court of Kane County, Illinois) is disallowed for the purposes of this Proceeding.

3-m. Within sixty days from the date of the issuance of each of the foregoing checks, Nathan Yorke shall stop payment of any check then unpaid and shall deposit the total amount of such unpaid Checks with the Referee by Certified Check drawn and signed as aforesaid.

3-n. Within seventy days from the date of the issuance of the last of the foregoing Checks, unless otherwise ordered by this Court before said date, Nathan Yorke shall file a verified Report with the Referee, together with all cancelled checks and a Bank statement showing disbursement of all deposited funds, as required by the provisions of Chapter XI of the Federal Bankruptcy Act and under the Debtor's Plan of Arrangement hereby confirmed.

The Court Further Orders, Adjudges And Decrees That:

4. This Court shall retain jurisdiction of the subject matter hereof and of the parties hereto, as set forth in Paragraph 1 of this Order, until further Order of this Court or until final disposition of the pending Suit entitled Northern Illinois Development Corporation vs. Orville P.

Fox and St. Charles National Bank, Trustee, Case No. 59-1692, in the Circuit Court of Kane County, Illinois; and, during the time said jurisdiction is retained, this Court shall have jurisdiction to enter any and all Orders, necessary and proper for the protection and preservation of the interests of the Unsecured Creditors in the Damage Proceeds, if any, resulting or reasonably expected to result from said litigation.

5. The Debtor shall proceed with the prosecution of said pending Suit, with all reasonable dispatch, looking toward recovery of such Damage Proceeds as may be possible, in the interests of the Unsecured Creditors. The Debtor, in November and December 1959, retained Wayland B. Cedarquist and the firm of Nelson, Boodell, Foster, Sugrue & Crowley, Chicago, Illinois, together with Charles H. Atwell, Aurora, Illinois, to be its Attorneys with regard to said Suit. The Debtor is authorized to continue to retain said Attorneys for the purposes of said Suit and related matters, on the basis of Debtor's payment of Attorneys' Fees and Disbursements out of the Damage Proceeds, if any, provided that it is the determination of this Court that it is in the interests of the Unsecured Creditors that, if there is a gross recovery up to $250,000, the amount to be allowed by this Court for such Attorney's Fees and Disbursements shall (unless otherwise ordered by this Court on Petition by said Attorneys and on Notice to all parties to this Proceeding) be 25% of whatever gross recovery is realized, and, if there is a gross recovery over $250,000, said amount to be allowed shall (unless otherwise ordered by this Court on Petition by said Attorneys and no Notice to all parties to this Proceeding) be 20% of the gross recovery.

6. The Debtor, in the event it recovers any Damage Proceeds in the foregoing Suit, whether by Settlement, or by Judgment and Collection, shall proceed with the Second Distribution under the Plan of Arrangement as follows:

6-a. The Debtor, within five calendar days after its receipe of any Damage Proceeds in the foregoing

suit, shall deliver the same to Nathan P. Yorke, the Disbursing Agent, appointed by this Court in this cause.

6-b. Nathan P. Yorke shall receive said Damage Proceeds and deposit the same in an account to be maintained by him as Disbursing Agent herein; shall promptly disburse said monies (so far as funds are available) as provided in Sub-Paragraphs 6-c, 6-d and 6-e hereof; and shall remit any balance, remaining after such payments, to the Referee and shall file his Report, as provided in Sub-Paragraphs 6-f and 6-g hereof. Nathan P. Yorke shall make disbursement of said monies by checks drawn and signed by him, as Disbursing Agent appointed by this Court.

6-c. Nathan P. Yorke shall issue his checks and pay, either in full, or Pro Rata, all parties named in this Sub-Paragraph, the sums due to Wayland B. Cedarquist and Charles H. Atwell, for Attorneys' Fees and Disbursements, both in regard to the period from January 15, 1963, to the date of this Order (as set by further Order of this Court), and in regard to said Damage Suit; the sum of $15,000.00 due to Haffa in repayment of advances made by him to the Debtor in this Proceeding; and the sum of $20,000.00 to Frank M. Whiston and Co., balance due for Brokerage Commission.

6-d. Nathan P. Yorke shall next issue his checks and pay to Haffa any then-existing liquidated liability (together with such amount as this Court shall determine to be fair and equitable compensation to Haffa for future years' liabilities) of Haffa, his successors or assigns (the same to discharge, pro tanto, the Agreement of NIDC to indemnify Haffa, his successors and assigns) as to the Fox 1% of Parimutuel receipts of penalty for non-racing, provided that he shall not issue said check unless this Court has first entered a first Order approving the same.

6-e. Nathan P. Yorke shall next issue his checks and pay to each person named in Exhibit D (Secured Creditors) and Exhibit E (Unsecured Creditors), attached hereto and made a part hereof, and the remaining funds then in his hands as Disbursing Agent, on a Pro Rata basis, per capita, throughout both classifications, based on the amounts set opposite the respective names, specified in Exhibit D as "Balance" and, as to Exhibit E, being the difference between "Claim as Allowed" and "Computed At 5%".

6-f. Within sixty days from the date of the issuance of each of the foregoing checks, Nathan P. Yorke shall stop payment of any check then unpaid and shall deposit the total amount of such unpaid Checks with the Referee by Certified Check drawn and signed as aforesaid.

6-g. Within seventy days from the date of the issuance of the last of the foregoing Checks, unless otherwise ordered by this Court before said date, Nathan P. Yorke shall file a verified Report with the Referee, together with all cancelled checks and a Bank Statement showing disbursement of all deposited funds, as required by the provisions of Chapter XI of the Federal Bankruptcy Act and under the Debtor's Plan of Arrangement hereby confirmed.

7. This Court, upon approval of the foregoing verified Report of Nathan P. Yorke, as to the Second Distribution, shall terminate its jurisdiction of the Debtor, all parties hereto, and the subject matter hereof.

Dated at Joliet, Illinois this 19th day of July, 1963.

.....

F. Donald Delaney, Referee in Bankruptcy

APPENDIX B

84

UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

In the Matter of	)	In
	)	Proceedings
Northern Illinois Development	)	for an
Corporation, operating the	)	Arrangement
Aurora Downs, Inc. (a wholly	)	under
owned subsidiary),	)	Chapter XI
Debtor	)	No. 60 B 10589

ORDER
(Docketed)

At Chicago, Illinois, in
said District and Division
on August 8, 1963

This matter comes on to be heard on petitions for review of the orders entered July 17, 1963 and July 19, 1963 by F. Donald Delaney, Referee in Bankruptcy, overruling the objections to confirmation of, and confirming the second amended plan of arrangement proposed by the debtor herein. The petitions for review were filed by Sportservice Corporation, an unsecured creditor; J. C. Granata, a stockholder; St. Charles National Bank, as trustee under Trust No. 85, and Orville P. Fox, individually; being the sole beneficiary of said trust; and Charles P. McFarland, a shareholder and unsecured creditor.

The court having examined the orders overruling objections, the order of confirmation, and the order amendatory thereof, and having examined the petitions for
85 review, having heard arguments in support of, and in opposition to the order of confirmation and the order

amendatory thereof, and having reviewed the entire record of these proceedings, finds and concludes as follows:

A. The detailed findings of fact and conclusions of law contained in the order entered July 19, 1963 confirming the second amended arrangement proposed by the debtor are fully supported by the evidence and by the applicable law.

B. The petitioners have failed to establish either in their petitions for review or oral argument that any or all of the findings or conclusions of the referee are unsupported by the record or are clearly erroneous.

C. The objections raised by said petitions for review relate principally to the finding by the referee that the real property of the debtor corporation is a speculative property, highly perishable in nature and with limited resale value. These objections cannot be raised again at this time because the United States Court of Appeals for the Seventh Circuit, in an earlier appeal in this case has held that the record in this proceeding "amply demonstrate[s] the highly speculative nature of a purchase of the property." (309 F. 2d. 882, 885).

D. In addition, the petitions filed by Orville P. Fox and St. Charles National Bank, as trustee, and by J. C. 86 Granata must be denied for the following further reasons:

1. The United States Court of Appeals for the Seventh Circuit, in the earlier appeal above referred to, held that Orville P. Fox and St. Charles National Bank, as trustee, had no status to object to any order confirming an arrangement in this proceeding.

2. J. C. Granata has admittedly no interest in this proceeding except as a stockholder of the debtor corporation and the United States Court of Appeals for the Seventh Circuit, in the earlier opinion above referred to, specifically held that stockholders of the debtor corporation have

no equity in the assets of the debtor and no status to object to any plan or arrangement in this proceeding.

3. The sole objection made by Orville P. Fox and St. Charles National Bank, as trustee, is that the order of confirmation makes no provision for allowance of interest on their claim from and after November 14, 1961. Petitioners cannot object thereto because the referee, on July 18, 1963, entered a final order disallowing their claim for interest from and after said date, and no appeal or review has been taken from said final order of July 18, 1963.

Now, Therefore, It Is Hereby Ordered that the petitions filed by Sportservice Corporation, an unsecured creditor; J. C. Granata, a stockholder; St. Charles National
87 Bank, as trustee under Trust No. 85, and Orville P. Fox, individually, being the sole beneficiary of said trust; and Charles P. McFarland, a shareholder and unsecured creditor, for review of the orders entered by the referee in bankruptcy on July 17, 1963 and July 19, 1963, confirming the second amended arrangement proposed by the debtor herein be and said petitions for review hereby are denied.

It Is Further Ordered that the orders entered July 17, 1963 by the referee in bankruptcy overruling objections to the second amended arrangement proposed by the debtor, together with the order and amendatory order entered by the referee in bankruptcy on July 19, 1963, confirming the second amended plan of arrangement proposed by the debtor, be and said orders hereby are affirmed in all respects.

Enter:

/s/ Igoe

District Judge.

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

In The Matter Of NORTHERN ILLINOIS DEVELOPMENT CORPORATION, an Illinois corporation, operating the AURORA DOWNS, INC. (a wholly owned subsidiary), Debtor, in Chapter XI Proceeding	In Bankruptcy No. 60 B 10589

SECOND AMENDED PLAN OF ARRANGEMENT

Northern Illinois Development Corporation, an Illinois corporation, Debtor, respectfully submits the following Second Amended Plan of Arrangement:

1. Northern Illinois Development Corporation, Debtor, hreinafter referred to as "NIDC", submits this Second Amended Plan of Arrangement for reasons set forth in detail in a certain Petition for Leave to file said Amended Plan (said Petition having been filed with this Court on June 21, 1963).

2. This Second Plan of Arrangement will set forth the following, in summary form, supplemented by the detailed Schedules, attached:

Debtor's Assets.
Debtor's Liabilities.
Debtor's Proposed Second Plan of Arrangement.

3. The Debtor's assets consist of the following, here set forth in summary form:

(3-a) NIDC owns the Fee Simple Interest approximately 1½ acres of the Front Property at the Aurora Downs Race Track.

(3-b) NIDC owns the Buyer's Equitable Interest in the Aurora Downs Race Track, under a certain Agreement dated March 14, 1957, between St. Charles National Bank and Orville P. Fox, as Sellers, and David Schwanz, as Buyer, the same having been assigned by Schwanz to NIDC. The Race Track consists of approximately 120 acres, which, together with the foregoing 1½ acres, totals approximately 121⅓ acres of land. The Race Track is improved with facilities for Harness Racing Meets. The Front Property is improved, with the Hilton Inns Motel, on about 12-9/10 acres of the Front Property.

(3-c) NIDC is also Plaintiff in a certain suit against Fox and St. Charles Bank, Case No. 59-1692, pending in the Circuit Court of Kane County, Illinois, for $2,500,000 Damages arising from Fox's injury to the business and property of NIDC in 1959 and subsequent years.

(3-d) NIDC is also the Seller in a certain Agreement, dated April 5, 1963, and amended April 30, 1963, whereby Titus Haffa agrees to buy NIDC's Equitable Interest and Fee Simple Title, as above set forth, in the Aurora Downs Race Track for $1,200,000 cash, on terms and conditions set forth in the Agreement and Amendment.

4. The Debtor's liabilities consist of the following, set forth in Exhibit AA attached hereto and in the several Schedules attached hereto, and here set forth in summary form:

(4-a) Costs of Administration in this Proceeding, amounting to $137,950.90 to the date hereof, or as further determined by the Referee. Includes Referee's Charges, Attorneys' Fees, Brokerage

Commission Claim, and so on. See Paragraph 9 hereof and Exhibit AA as to proposed order of payment.

(4-b) Secured Claims in this Proceeding, amounting to $964,941.57. Includes Net Balance due Fox, and St. Charles Bank; Taxes due State or due County Collector; and Haffa Claim for Repayment of Advances. See Paragraph 9 hereof as to proposed order of payment.

(4-c) Secured Creditors, amounting to $209,434.98. Includes Claims based on Judgments and Mechanics Liens. See Paragraph 9 hereof and Exhibit AA as to settlements and compromises.

(4-d) Unsecured Creditors, amounting to $398,478.76. See Paragraph 9 hereof and Exhibit AA as to Consents of Majority of Unsecured Creditors.

5. Northern Illinois Development Corporation, Debtor, herewith submits the following as a Second Amended Plan of Arrangement With Creditors, pursuant to Chapter XI of the Federal Bankruptcy Act, and proposes the following to its Creditors as an arrangement for the payment of its indebtedness. Said Second Amended Plan is set forth at Paragraphs 6 through 11 as follows.

6. Proposed Classes of Creditors:

The Debtor proposes that there shall be the following classification of Creditors:

Class I: Priority Creditors, consisting of:

Balance due St. Charles National Bank and Orville P. Fox, being the balance due the Real Estate Purchase Agreement, together with other sums allowed them by Order of this Court dated November 14, 1961, as set forth in Exhibit AA attached hereto and in the Schedules attached hereto.

Costs of Administration as set by the Federal Bankruptcy Act, or as allowed by this Court, as set forth in Exhibit AA and in the Schedules.

Taxes and other charges due to the State of Illinois, to the County Collector of Kane County, Illinois, as set forth in Exhibit AA and in the Schedules.

Real Estate Commission due Frank M. Whiston on proposed sale by Debtor of its Buyer's Equitable Interest to Titus Haffa, as set forth in Exhibit AA and in the Schedules.

Secured Creditors, consisting of persons holding Securities or entitled to preference by laws, set forth in Exhibit AA and in the Schedules.

Class II: Unsecured Creditors set forth in Exhibit AA and in the Schedules attached hereto.

7. Proposed Plan of Proceeding:

The Debtor proposes to proceed with the sale of its Buyer's Equitable Interest and Fee Simple Title in the Aurora Downs Race Track, to Titus Haffa for $1,200,000 Cash, as provided in the Agreement dated April 5, 1963, and the Amendment dated April 30, 1963. The Debtor proposes that the $1,200,000 Cash Proceeds of Sale will, following the Closing of the transaction of sale, be distributed in a First Distribution, as follows:

First Distribution, of $1,200,000 Cash Proceeds of Sale:

(7-a) Pay in cash, in full, or as hereafter ordered by this Court, St. Charles National Bank, Trustee, under Trust No. 83, and Orville P. Fox, Trust Beneficiary, the balance due on the Real Estate Purchase Agreement dated March 14, 1957, together with such other sums as are specified by Order of this Court dated November 14, 1961.

(7-b) Pay in cash, all Costs of Administration, in full, or as voluntarily settled and compromised, as determined by Referee in such First Distribution.

(7-c) Pay in cash, in full, all taxes and other charges due to the State of Illinois, to the Collector of Kane County, Illinois, and to any other Political Subdivision.

(7-d) Pay in cash, that part of the Brokerage Commission due Frank M. Whiston, as voluntarily settled and compromised, up to $30,000 in such First Distribution.

(7-e) Pay in cash, all Secured Creditors, in full, or as voluntarily settled and compromised, up to $125,055.86 in such First Distribution.

(7-f) Distribute the remaining funds then in the hands of the Disbursing Agent appointed by this Court, on a pro-rata basis, among the Unsecured Creditors, based upon their Claims as allowed by the Court, as set forth in Schedule A-3 attached hereto; provided, however, that such distribution shall not be less than five per cent (5%) of the face value of said Claims due to the Unsecured Creditors, in such amounts as are set forth in Schedule A-3.

8. Further Proposed Plan of Proceeding:

The Debtor further proposes that it will prosecute its Claim for Damages against Orville P. Fox and St. Charles National Bank, Trustee, in Suit N 59-1692 in the Circuit Court of Kane County, Illinois. The Debtor states that said Claim for Damages is valid and should result in a determination that Fox and St. Charles Bank are liable for Damages for unlawful interference with and injury to NIDC's Business and Equitable Interest and Fee Simple Title in the Race Track Property, said Buyer's Equitable Interest having been held by this Court to be fully valid and non-forfeited, which Decision is Res Adjudicata as to Fox and the Bank. The Debtor states that if Cash Damages are realized, by settlement, or by judgment and collection, said Cash Damages will be distributed, in a Second Distribution, so far as there are funds available for such purposes, as follows:

Second Distribution, of Damage Proceeds, if any, from Orville P. Fox and St. Charles National Bank:

(8-a) Pay in cash the Attorneys' Fees, and their Disbursements, with regard to said Damage Suit, as

determined by this Court; and pay in cash any sums due to Haffa and others, in repayment of advances made by them to the Debtor in this Proceeding, as determined by this Court.

(8-b) Pay in cash any then-existing liquidated liability (together with such amount as this Court shall determine to be fair and equitable compensation to Haffa for future years' liabilities) of NIDC to Haffa, his successors and assigns, on the NIDC Agreement to indemnify as to the Fox 1% of Parimutuel Receipts or Penalty for Non-Racing.

(8-c) Pay any remaining funds toward any balances due Secured and Unsecured Creditors, pro rata on a per capita basis throughout both classifications.

9. Settlements and Consents:

The Debtor represents that it has obtained Settlements and Consents as follows:

(9-a) Frank M. Whiston has agreed that his $50,000.00 Claim for Brokerage Commission shall be paid (i) First Distribution of $30,000.00 cash from Cash Proceeds of Sale, and (ii) Second Distribution of $20,000.00 from Damage Proceeds, if any, from Fox and St. Charles Bank.

(9-b) The Debtor proposes that the Haffa Claim for Repayment of $15,000.00 Advances be paid from Damage Proceeds, if any, from Fox and St. Charles Bank, as set forth at Paragraph 8 (a) hereof.

(9-c) Secured Creditors, whose full Claims total $209,434.98, have agreed to settle and compromise said Claims, so that the same shall be paid (i) First Distribution of $125,055.86 cash from Cash Proceeds of Sale, and (ii) Second Distribution of $84,379.12 from Damage Proceeds, if any, from Fox and St. Charles Bank. Some of these Agreements are conditioned upon payment of First Distribution within a certain time. All such

Agreements will be filed with this Court within 5 days from the date hereof.

(9-d) Unsecured Creditors, numbering 67 Creditors, whose Claims total $398,478.76, have agreed to the Proposed Plan (First Distribution at 5% of Claims and Second Distribution, pro rata, from remaining Damage Proceeds, if any, from Fox and St. Charles Bank), in that 34 Creditors with Claims in excess of $200,000.00, have Consented in writing to the proposed Plan, the same being a Majority in Numbers and in Dollar Amounts. All Consents will be filed with this Court within 5 Days from the date hereof.

10. Certain Creditors Claims:

The Debtor represents the following, with regard to certain Creditor's Claims and the classification thereof:

(10-a) The Claim of Old Second National Bank of Aurora for $77,341.71 was listed in Prior Proposed Plans in Schedule A-4, as an Unsecured Claim entitled to preference, as permitted under the Federal Bankruptcy Act, because due and owing to a Bank. Said Claim is listed in this proposed Second Amended Plan with all other Unsecured Creditors in Schedule A-3.

(10-b) The Claim of Chicago National Bank for $55,000.00 was listed in Prior Proposed Plans in Schedule A-4, as an Unsecured Claim entitled to preference because due and owing to a Bank. Said Claim is listed in this Second Amended Plan as being the Claim of Sportservice, Inc., which has paid said Bank. Said Claim is listed in this Plan with all other Unsecured Creditors in Schedule A-3.

(10-c) The Claim of Fox and St. Charles Bank for $2,000,000.00 (alleged Damages claimed in pending suit entitled *Fox and St. Charles Bank* v. *NIDC*, Circuit Court of Kane County, Illinois,

Case No. 59—1805) was listed in Schedule A-2 in Prior Plans, in error, and is listed in Schedule A-3 in this Second Amended Plan. The Debtor further states that said Claim arises from the same subject matter as the Title Litigation Dispute, already resolved in this Bankruptcy Proceeding in favor of NIDC, and against Fox and St. Charles Bank; that said Claim is either barred by the rules of Res Adjudicata or is too contingent to be ruled upon as a full Claim herein; and that this Court should therefore not delay Confirmation of the proposed Plan but should enter an Order that said Claim is barred or is contingent.

11. Notices and Retention of Jurisdiction:

The Debtor proposes the following with regard to Notices and Retention of Jurisdiction:

(11-a) Notice should be mailed to all Attorneys of Record, Claimants and Creditors as of the date hereof, providing that Objections to the Plan, if any, shall be filed within ten days; that Hearings on any such Objections shall be held on the twelfth day from the date hereof; and that Debtor's application for Confirmation of the proposed Plan shall be heard on said twelfth day.

(11-b) The Debtor proposes that, if said Plan is confirmed and if said Sale to Haffa is concluded, this Court shall retain jurisdiction of the Debtor, of all parties presently subject to its jurisdiction herein, and of the subject matter hereof, until further Order of this Court, or until final disposition of the pending suit entitled *Northern Illinois Development Corporation* v. *Orvin P. Fox and St. Charles National Bank, Trustee*, Case No. 59—1692 in the Circuit Court of Kane County, Illinois; and that, while such jurisdiction is retained, this Court shall have jurisdiction to enter any and all Orders, necessary and proper for the

conduct of said litigation and for the protection and preservation of the interest of Unsecured Creditors in the Damage Proceeds, if any, from said litigation.

(11-c) The Debtor proposes that, upon final disposition of the aforesaid suit, and/or upon payment (as proposed herein, for Costs and/or to Secured Claims and/or to Secured Creditors and/or to Unsecured Creditors) of the Damage Proceeds, if any, resulting therefrom, this Court shall terminate its jurisdiction of the Debtor, all parties hereto, and the subject matter hereof.

Wherefore, Northern Illinois Development Corporation, Debtor, respectfully submits a proposed Second Amended Plan of Arrangement with Creditors, as herein set forth, and asks that this Court enter the following Orders:

A. Order that Notice of dates for filing of Objections, Hearings thereon, and Hearings on Debtor's Application for Confirmation, be mailed as herein proposed.

B. Order that the certain Claim of Orville P. Fox and St. Charles National Bank, set forth at Paragraph 10-c hereof, is either barred, or is too contingent to require determination before proceeding with this Plan.

C. Enter all appropriate Orders on Objections to the Plan, if any; on Confirmation of the Plan; on Closing of the Sale to Titus Haffa; and on retention of Jurisdiction for purposes of the certain litigation referred to at Paragraph 11-b hereof.

Northern Illinois Development
Corporation, Debtor

By /s/ Wayland B. Cedarquist
Wayland B. Cedarquist, and
/s/ Charles H. Atwell
Charles H. Atwell,
Attorneys for Debtor.

Dated: June 21, 1963

Wayland B. Cedarquist
Nelson, Boodell, Foster,
Sugrue & Crowley
33 North La Salle Street
Chicago 2, Illinois
RA 6-4300

Charles H. Atwell
Keystone Building
Aurora, Illinois
TW 2-4341

VERIFICATION

State of Illinois }
County of Cook } ss.

F. David Schwanz, being sworn, states that he is the President of Northern Illinois Development Corporation, Debtor in the foregoing Proceeding; that he is familiar with the facts as regards Debtor's condition and other matters relevant to the subject matter of said Proceeding; that he has read the foregoing proposed Second Amended Plan of Arrangement with Creditors and Schedules; and that the facts set forth therein are true, excepting those set forth on information and belief, and, as to those, he believes them to be true.

/s/ F. David Schwanz
F. David Schwanz

Dated: June 20, 1963
Subscribed and sworn
to before me this
20th day of June,
1963.
/s/ Shauneen McGuire
Notary Public

(Seal)

APPENDIX D.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1963—SEPTEMBER SESSION, 1963

IN THE MATTER OF NORTHERN ILLINOIS DEVELOPMENT CORPORATION, an Illinois corporation, operating the AURORA DOWNS, INC. (a wholly owned subsidiary),
DEBTOR.
SPORTSERVICE CORPORATION,
Creditor-Appellant,
No. 14292 v.
NORTHERN ILLINOIS DEVELOPMENT CORPORATION, *Debtor-Appellee.*

J. C. GRANATA,
Shareholder-Appellant,
No. 14293 v.
NORTHERN ILLINOIS DEVELOPMENT CORPORATION, *Debtor-Appellee.*

ORVILLE P. FOX and ST. CHARLES NATIONAL BANK, TRUSTEE under Trust No. 85,
Creditors-Appellants,
No. 14316 v.
NORTHERN ILLINOIS DEVELOPMENT CORP., *Debtor-Appellee.*

CHARLES P. MCFARLAND,
Shareholder-Appellant,
No. 14317 v.
NORTHERN ILLINOIS DEVELOPMENT CORP., *Debtor-Appellee.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

October 17, 1963

Before DUFFY, CASTLE and KILEY, *Circuit Judges.*

CASTLE, *Circuit Judge.* These appeals[1] are prosecuted by the respective appellants from an order of the District Court which denied their petitions for review and affirmed, in all respects, orders of the Referee in Bankruptcy which denied objections filed to a Second Amended Plan of Arrangement submitted by Northern Illinois Development Corporation,[2] debtor-appellee, and confirmed said arrangement.

Appellants' claims of error upon which they predicate their request for reversal and for remand with directions to adjudicate the debtor a bankrupt and to liquidate its assets in a straight bankruptcy proceeding are reflected in their respective contentions which are summarized as follows:

In Appeal No. 14316 appellants Orville P. Fox and St. Charles National Bank, as Trustee under Trust No. 85, secured creditors, assail the arrangement on the ground that it exceeds the permissible scope of a Ch. XI arrangement and affects their rights as secured creditors in not providing for payment of interest accruing subsequent to November 14, 1961, on the secured indebtedness pursuant to the terms of the purchase contract creating the indebtedness.

In Appeal No. 14292 appellants Sportservice Corporation, an unsecured creditor, contends (1) the arrangement is not authorized under Ch. XI of the Bankruptcy Act because it provides for the sale of all of the assets of NIDC[3] and effects a liquidation of the corporation; (2) the value of the assets exceeds the $1,200,000.00 for which they are authorized to be sold at a private sale; and (3) the findings that the arrangement is feasible and workable, in the

[1] The four appeals were consolidated for oral argument before this Court and will be disposed of in one opinion.

[2] Referred to herein as NIDC.

[3] The Second Amended Plan of Arrangement proposes a sale of NIDC's assets with the exception of a claim for damages against appellants Fox and St. Charles National Bank, Trustee etc., which is the subject of a pending suit and declared in the debtor's schedule of assets to be not capable of precise dollar evaluation. The proceeds from this asset, if any are realized, are to be the subject of a second distribution under the arrangement.

best interests of creditors, and proposed in good faith, are not supported by the record.

In Appeal No. 14317 appellant Charles P. McFarland, both an unsecured creditor and a shareholder of NIDC, makes contentions substantially the same as those advanced by Sportservice and in addition urges that the contemplated sale of assets violates a provision of Illinois law (Ill. Rev. Stat. 1961, Ch. 32, § 157.72) under which a favorable vote of at least two-thirds of the outstanding shares entitled to vote is necessary.

In Appeal No. 14293 appellant J. C. Granata, a shareholder of NIDC, makes contentions similar to those advanced by Sportservice and McFarland.

The properties which are the subject of NIDC's purchase agreement with Fox and the Bank are described in our opinion in *In Re Northern Illinois Development Corporation*, 7 Cir., 309 F. 2d 882, cert. den. April 15, 1963, 372 U. S. 965. Subsequent to our opinion in that appeal the contract there involved for the sale of these assets of NIDC, which contract had been approved subject to confirmation of the then proposed plan of arrangement, terminated under its time limitation provision without the sale having been effected. Titus Haffa, the prospective purchaser, then made an offer proposing a purchase price of $1,150,000.00 and increased his earnest money deposit to $150,000.00. On April 30, 1963, Haffa and NIDC entered into an amended agreement providing for a purchase price of $1,200,000.00. On May 9, 1963, the referee entered an order approving this contract for sale subject to confirmation of an amended plan of arrangement to be presented by NIDC. The arrangement submitted was accepted by a majority in number and in amount of all unsecured creditors.

We will not repeat here the additional factual background which is set forth in our previous opinion (309 F. 2d 882) but inasmuch as the instant appeals are being considered on a short record we do accede to appellants' requests that

we take judicial notice of the record in the previous appeal in our consideration of the issues now presented.

From our review of the record we are convinced that the factual findings of the referee, left undisturbed by the District Court, have substantial support in the record. And unless such findings are clearly erroneous we have no right to reject them. *In Re Rafdo Enterprises, Inc.*, 7 Cir., 297 F. 2d 505, 507. Furthermore, we perceive no error of law in the District Court's affirmance of the referee's rejection of the objections urged and his confirmation of the arrangement.

The contention of appellants Fox and the Bank that the arrangement deprives them of interest due and payable subsequent to November 14, 1961, under the provisions of NIDC's purchase agreement is without merit. The arrangement merely accepts and recognizes their secured claim in the status in which it finds it. It was the order of November 14, 1961, the District Court's affirmance of which was sustained on the prior appeal (309 F. 2d 882), which declared Fox's attempted forfeiture unavailing, the NIDC purchase contract to be in full force and effect, and limited the payment of interest to November 14, 1961. The appellants made no contentions in their previous appeal with respect to the interest issue they now seek to raise. The record discloses nothing which has occurred since the affirmance of the November 14, 1961 order which would now afford a basis for modification of that order's provision precluding the payment of interest beyond its date—and that order is not subject to relitigation in the instant appeal. The Second Amended Plan of Arrangement does not purport to alter appellants' rights as secured creditors. It gives full recognition to the adjudicated status of their secured claim.

In support of their contention that the arrangement is not one authorized in a Ch. XI proceeding for the reason that the contemplated sale of assets and plan effect a liquidation of the corporation without compliance with the cited Illinois statutory provision, and affects their rights as shareholders, appellants McFarland and Granata rely on

In Re May Oil Burner Corporation, D. C. D. Md., 38 F. Supp. 516. But in that case there was an affirmative finding that the assets of the debtor-corporation exceeded its liabilities, and under the plan proposed the debtor was to become a holding company owning but 26% of the stock of a new corporation to which its assets would be transferred with the consequent dilution of the shareholder's right of control over corporate action, indirect loss of the shareholder's pre-emptive right to maintain his proportional interest as a stockholder, and loss of a right to share in management by loss of the right to vote in the first instance for directors in the new corporation. These factors serve to distinguish the case and to make it inapposite here.

The plan of arrangement here under consideration provides for no adjustment or alteration of shareholders' interests. Moreover, as we had occasion to observe in the previous appeal (309 F. 2d 882, 885) "there is nothing in the record which indicates that a sale of the property under ordinary bankruptcy proceedings would produce any money for NIDC's stockholders". It is apparent from the record that no shareholder equity is available and under the circumstances here involved provisions as to shareholder consent are not meaningful. The authority of the District Court to approve a sale of all of the corporation's assets is not affected or circumscribed thereby.

The remaining main contention of Sportservice, McFarland and Granata is that the approval of the contract for sale and confirmation of the Second Amended Plan of Arrangement was error for the reason that a sale which disposes of all of the assets of a debtor corporation and an arrangement which in effect liquidates it are not permissible in a proceeding under Ch. XI of the Bankruptcy Act. These appellants argue that the basic purpose of Ch. XI is to effect a rehabilitation of a financially distressed or insolvent debtor and that its provisions may not be utilized as a substitute for a proceeding in straight bankruptcy to effect a liquidation. And, relying upon *In Re Pure Penn Petroleum Co. Inc.*, 2 Cir., 188 F. 2d 851, they urge that

Section 313(2) of the Bankruptcy Act (11 U. S. C. A. § 713(2)) which provides the court may:

> "(2) upon such notice as the court may prescribe and upon cause shown, authorize the receiver or trustee, or the debtor in possession, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the court may approve;"

does not permit of a sale of all of the assets of a debtor corporation and that Section 306(1) of the Act (11 U. S. C. A. § 706(1)) does not permit of a plan of arrangement which in effect results in liquidation.

But in *Pure Penn Petroleum*, where an order authorizing the sale of all of the corporation's assets was reversed, the court pointed out that no emergency was present which constituted "cause" which would warrant approval of such a sale. The requisite emergency factor is not lacking here. As we had occasion to observe on the prior appeal (309 F. 2d 882, 885) "the corporation's principal asset—a race track, the disastrous financial experience with the first racing meet, and the fact that the party who would have been purchaser under an earlier contract approved by the referee and the court withdrew therefrom, all serve to amply demonstrate the highly speculative nature of a purchase of the property for the use for which it is fitted—the use necessary to realization of its potential value". And the subsequent events disclosed by the record now before us serve only to confirm that observation and to establish that both the potential value of this asset and its purchase at a price reasonably commensurate with its value for its highest and best use are indeed "perishable" factors. Cf. *In Re Rosenbaum Grain Corporation*, 7 Cir., 83 F. 2d 391, 393. The equities of the situation here presented and the best interests of the creditors make it imperative that the property be disposed of without further delay—and the record affords no basis for a conclusion that these assets will bring a price higher than that called for in the contract for sale which has been approved. As it is, the equity which will be available for distribution among the unse-

cured creditors has shrunk from 75% to 5% plus what may be realized from a pending lawsuit. It is our view that Ch. XI does not, on the facts here presented, require that the debtor be compelled to resort to further proceedings in straight bankruptcy to effect the sale and distribution which appears to be the only feasible solution and which has been consented to by the requisite unsecured creditor interests.

It has been recognized that where a sale of all the assets of a debtor in a proceeding designed for the purpose of effecting reorganization rather than liquidation is justified because of the existence of an emergency warranting such sale the fact that the sale is not in aid of a reorganization plan and will in effect result in a liquidation does not require that the sale await a liquidation in a straight bankruptcy proceeding. *In Re V. Loewer's Gambrinus Brewery Co., Inc.*, 2 Cir., 141 F. 2d 747; *Frank* v. *Drinc-O-Matic, Inc.*, 2 Cir., 136 F. 2d 906.

The findings of the referee, left undisturbed by the District Court, establish the presence of the requisite emergency to satisfy the "cause" requirement of Section 313 (2). In our opinion the approval of the contract for sale was not error—those findings are not clearly erroneous—and the fact that the sale results in a plan of arrangement which effects a liquidation does not in our opinion, on the facts of this case, require rejection of the arrangement, dismissal of the Ch. XI proceeding, and resort to a straight bankruptcy proceeding. We do not read *Pure Penn Petroleum* as so requiring. The references in that decision to the additional "protective [illegible]visions" with which an ordinary bankruptcy proceeding surrounds a sale of all the assets of a debtor and to the requirements of Section 356 (11 U. S. C. A. § 756) that a plan of arrangement do more than propose that creditors be given what the law provides in liquidation under straight bankruptcy i.e., modify or alter rights of unsecured creditors, are made with respect to a situation where no emergency is present requiring a sale in the best interests of creditors.

We have considered the other contentions advanced by the appellants but on the record before us find them without merit. The appellants would have us substitute our discretion for that of the District Court, and that under familiar principles we should not, and will not do.

The judgment order of the District Court is affirmed.

AFFIRMED.

APPENDIX E.

Chapter 11 U.S.C. 53
General Order No. 18.

Order 18. Sale of Property

(1) All sales shall be by public auction unless otherwise ordered by the court. Where the property is sold by an auctioneer he shall, upon completion of the sale, file with the court and also furnish the receiver or trustee an itemized statement of the property sold, the name of each purchaser, and the price received for each item or lot, or for the property as a whole if it is sold in bulk.

(2) Upon application to the court, and for good cause shown, the receiver or trustee may be authorized to sell the property of the estate or any specified portion thereof at private sale; in which case he shall keep an accurate and itemized account of all property sold, of the price received therefor, and to whom sold; which account he shall forthwith file with the court. (As amended Apr. 17, 1933; June 1, 1936; Nov. 16, 1937; Jan. 16, 1939, eff. Feb. 3, 1939.)

Chapter 11 U.S.C. 706

706

For the purposes of this chapter, unless inconsistent with the context—

(1) "arrangement" shall mean any plan of the debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms;

Chapter 11 U.S.C. 713

713. Same; administration of estate.

Upon the filing of a petition, the court may, in addition to the jurisdiction, powers, and duties conferred and imposed upon it by this chapter—

(1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the court may designate;

(2) upon such notice as the court may prescribe and upon cause shown, authorize the receiver or trustee, or the debtor in possession, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the court may approve;

(3) whenever under this chapter the court is required or permitted to fix a time for any purpose, the court may upon cause shown extend such time. (July 1, 1898, ch. 541, §313, as added June 22, 1938, ch. 575, § 1,52 Stat. 906.)

Chapter 11 U.S.C. 766

§766. Requisites for confirmation.

The court shall confirm an arrangement if satisfied that—

(1) the provisions of this chapter have been complied with;

(2) it is for the best interests of the creditors and is feasible;

(3) the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and

(4) the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by this title.

Confirmation of an arrangement shall not be refused solely because the interest of a debtor, or if the debtor is a corporation, the interests of its stockholders or members will be preserved under the arrangement. (July 1, 1898, ch. 541, §366, as added June 22, 1938, ch. 575, §1,52 Stat. 911, and amended July 7, 1952, ch. 579, § 35,66 Stat. 433.)

Chapter 32 Ill. Rev. Stat. 1963, ch. 32, § 157.72

157.72. § 72. Sale, lease, exchange, or mortgage of assets, other than in usual and regular course of business. A sale, lease, exchange, mortgage, pledge, or other disposition of all, or substantially all, the property and assets, with or without the good will, of a corporation, if not made in the usual and regular course of its business, may be made upon such terms and conditions and for such consideration, which may consist, in whole or in part, of money or property, real or personal, including shares of any other corporation, domestic or foreign, as may be authorized in the following manner:

(a) The board of directors shall adopt a resolution recommending such sale, lease, exchange, mortgage, pledge, or other disposition and directing the submission thereof to a vote at a meeting of shareholders, which may be either an annual or a special meeting.

(b) Written or printed notice stating that the purpose, or one of the purposes, of such meeting is to consider the sale, lease, exchange, mortgage, pledge, or other disposition of all, or substantially all, the property and assets of the corporation shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided by this Act for the giving of notice of meetings of shareholders. If such meeting be an annual meeting, such purpose may be included in the notice of such annual meeting.

(c) At such meeting the shareholders may authorize such sale, lease, exchange, mortgage, pledge, or other disposition and fix, or may authorize the board of directors to fix, any or all of the terms and conditions thereof and the consideration to be received by the corporation therefor. Such authorization shall require the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting, unless any class of shares is entitled to vote as a class in respect thereof, in which

event such authorization shall require the affirmative vote of the holders of at least two-thirds of the outstanding shares of each class of shares entitled to vote as a class in respect thereof, in which event such authorization shall require the affirmative vote of the holders of at least two-thirds of the outstandings shares of each class of shares entitled to vote as a class in respect thereof and of the total outstanding shares entitled to vote at such meeting.

(d) After such authorization by a vote of shareholders, the board of directors nevertheless, in its discretion, may abandon such sale, lease, exchange, mortgage, pledge, or other disposition of assets, subject to the rights of third parties under any contracts relating thereto, without further action or approval by shareholders.

Chapter 32 Ill. Rev. Stat. 1963, ch. 32 § 157.76

157.76. § 76. Election to dissolve voluntarily by act of corporation. A corporation may elect to dissolve voluntarily and wind up its affairs by the act of the corporation, in the following manner:

(a) The board of directors shall adopt a resolution recommending that the corporation be dissolved voluntarily, and directing that the question of such dissolution be submitted to a vote at a meeting of shareholders, which may be either an annual or special meeting.

(b) Written or printed notice stating that the purpose, or one of the purposes, of such meeting is to consider the advisability of voluntarily dissolving the corporation, shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner provided in this Act for the giving of notice of meetings of shareholders. If such meeting be an annual meeting, such purpose may be included in the notice of such annual meeting.

(c) At such meeting a vote of the shareholders entitled to vote thereat shall be taken on a resolution to dissolve voluntarily the corporation, which shall

require for its adoption the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting, unless any class of shares is entitled to vote as a class in respect thereof, in which event the resolution shall require for its adoption the affirmative vote of the holders of at least two-thirds of the outstanding shares of each class of shares entitled to vote as a class in respect thereof, and of the total outstanding shares entitled to vote at such meeting.

(d) Upon the adoption of such resolution, a statement of intent to dissolve shall be executed in duplicate by the corporation by its president or vice-president, and verified by him, and the corporate seal shall be thereto affixed, attested by its secretary or an assistant secretary, which shall set forth:

(1) The name of the corporation.

(2) The names and respective addresses, including street and number, if any, of its officers.

(3) The names and respective addresses, including street and number, if any, of its directors.

(4) A copy of the resolution of the shareholders authorizing the voluntary dissolution of the corporation.

(5) The number of shares outstanding, and, if the shares of any class are entitled to vote as a class, the number of shares of each such class.

(6) The number of shares voted for and against the voluntary dissolution of the corporation, respectively, and, if the shares of any class are entitled to vote as a class, the number of shares of each such class voted for and against the voluntary dissolution of the corporation, respectively.